

SUBJECT: Amendments to the Open Records Act

COMMITTEE: Intergovernmental Affairs: favorable, without amendment

VOTE: 7 ayes--Lewis, Lauhoff, Criss, A. Edwards, Keller, Lee,
Pierce

1 nay--D. Hill

0 present, not voting

5 absent--Caraway, Joe Gibson, Gilley, Tejeda, Untermeyer

WITNESSES: For--NONE

Against--Archie Clayton, Texas Banking Department

DIGEST: This bill states that the Open Records Act is not to be used to restrict information which was available in the past. The custodian of a record may release information unless another law prohibits it. The bill provides that information must be made available if it is found to be relevant to a court case, unless a statute expressly states that the information is not subject to subpoena or use in court proceedings. It removes the punishment for release of information that is confidential. Disclosure of birth and death records is subject to the Vital Statistics Act instead of the Open Records Act. Student records are to be available in conformity with federal law. Inter-office and intra-office memos must be disclosed except to the extent that they would not be available by law to a private party in litigation. A party which successfully sues a governmental body to obtain an open record may be awarded reasonable attorney's fees and litigation costs. The penalty in the act for destroying or altering governmental records is repealed, since such a penalty is covered in the Penal Code.

PRO: The Open Records Act has been the subject of many court cases and Attorney General's opinions in the last five years. Also, the federal Freedom of Information Act has some provisions that are not the same as the Texas ones. This bill clarifies several provisions in the act that the courts and the Attorney General felt were vague. Also, it conforms certain provisions to the federal act. This will reduce confusion and litigation about open records.

The bill also requires that information must be made available when it is relevant to court cases. The cause of justice requires that information be readily available to those whose future is affected by court decisions; this bill assures litigants of the right to information relevant to their cases.

PRO
(continued)

The act currently prohibits disclosure of information made confidential by the act and provides a penalty for disclosing it. However, the act does not define "confidential." This provision is probably too vague to be enforceable. Its effect has been to deter release of information, contrary to the purpose of the act. SB 1025 repeals this provision, but does not allow the release of information if some other law makes it confidential.

The provision for the discretionary award of attorney's fees and costs is designed to encourage compliance with the intent of the act and to resolve any doubt in favor of openness. It would discourage dilatory tactics and frivolous denials of information. It is unfair to make the citizen or the Attorney General's office bear the cost when access to information has been wrongly denied.

CON:

Governor Briscoe vetoed a similar bill in 1977, and for good reason. The Open Records Act is a careful balance between the rights of those requesting release of information and those who keep the records and are entrusted with protecting citizens' privacy. These amendments would upset that balance. Further, personal privacy might be invaded by the disclosure of certain information currently protected from disclosure by the act.

Allowing attorney's fees and other court costs could encourage unwarranted litigation. Governmental bodies are not appropriated any money to pay such costs.

The Supreme Court recently ruled that certain information need not be disclosed for court cases. Judgments are often made that are necessary to certain administrative procedures, but that would not be made if the agencies had to reveal their confidential office memos. By not allowing this exception, this bill would hamper agency officials in fulfilling their duties.

COMMENTARY:

This bill is similar to SB 1226 of the last session (except that SB 1226 did not contain the provision relating to information in court cases). Governor Briscoe vetoed SB 1226.

In December 1978, the Texas Supreme Court decided (in Stewart vs. McCain) that the Banking Code gave the Department of Banking an absolute privilege against disclosure of certain confidential information concerning a bank investigation. The information was in the form of a memo to the department from the department's bank examiner. Section 1 of this bill would make such information accessible in litigation.

COMMENTARY
(continued)

The committee bill analysis erroneously lists Archie Clayton as testifying in favor of the legislation.

HB 824 (Lalor), HB 830 (Reyes), and HB 1969 (Ragsdale) would provide a penalty for failure to submit information that is public information. Currently no penalty is provided for those who violate the Open Records Act.